SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

Supreme Court of the United States

OCTOBER TERM, 1974
No. 74-468

CARLISLE WILSON WEBSTER - - **Petitioner**

versus

COMMONWEALTH OF KENTUCKY **Respondent**

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an Order (1) vacating its denial of the Petition for a Writ of CERTIORARI entered on December 16, 1974 and (2) granting the Petition. As grounds for this Motion, Petitioner states the following:

Petitioner was Deprived of the Effective Assistance of Counsel as a Result of the Representation of Co-defendants Having a Conflict of Interests.

The Petitioner is guaranteed the right to effective assistance of counsel by the Sixth and Fourteenth Amendments and as such to a fair and impartial trial. However, he was denied a fair trial in this instance due to the development of a situation wherein testimony as to a co-defendant's extra-judicial admission incriminating Petitioner was admitted into evidence without even an admonition or instruction to the jury

that the admission should not be considered against him.

At the trial of the case, Sheriff Maynard Nickell testified that co-defendant, Mildred Spencer, made an oral confession to him, *out of the presence of Petitioner,* that "when they pulled into the machine up there Webster and Cox fixed the machine, she didn't know what all they did, but they opened it and she stood lookout for them." (Appendix to original Petition, 9a). Certainly, if defense counsel William Bach had known of this admission prior to trial he would not have represented both Spencer and Webster because of the conflict of interests and the apparent requirement of different defenses. Further, counsel would have obviously objected to the prosecutor's motion that all of the charges be consolidated for trial (T.R. 3-4).

It must then be assumed that Mr. Bach did not learn of the extra-judicial admission until Sheriff Nickell testified from the stand, and that not until that point in time did he realize that he was representing two defendants with a conflict of interests. If counsel had been representing only Webster, his action could have been to object to the introduction of Sheriff's testimony as to the admission and move for a severance or request that an admonition be given to the jury limiting the use of the testimony. However, because of the baffling problem suddenly confronting him, Mr. Bach chose to do nothing until the time came for filing a motion for new trial, when he listed the absence of an instruction limiting Sheriff Nickell's testimony concerning the admission as error.

Defense counsel was presented with a situation wherein he must have felt that whatever action taken at

the time of the introduction of the Sheriff's testimony would have resulted in favoring the defense of one co-defendant while neglecting the defense of the other. An objection to the introduction of Mrs. Spencer's admission would have been an action towards discrediting her. And indeed, Mr. Bach would also have found it difficult to request to cross-examine his own client, Spencer, in an attempt to discredit her in favor of his other client, Webster. As a result, Webster's defense was neglected and he was denied his guaranteed Sixth Amendment right of confrontation. In direct conflict with the holding of this Court in *Bruton* v. *United States*, 391 U.S. 123 (1968), the jury was allowed to consider the admission of co-defendant Spencer as evidence against the Petitioner due to a resulting conflict of interests between Spencer and Webster.

A number of cases have held that the right to have the effective assistance of counsel is guaranteed by the Sixth Amendment and that a conflict of interests in the representation of two different defendants is a deprivation of this right. *Glasser* v. *United States*, 315 U.S. 60 (1942); *Peek* v. *United States*, 321 F.2d 934 (9th Cir. 1963); *United States* v. *Harris*, 261 F.2d 792 (9th Cir. 1958).

However, it is difficult to determine the precise test for ineffective assistance of counsel. In *Glasser*, a factual situation involving a court appointment of an attorney to represent two defendants, the language of this Court reads that a showing of specific prejudice need not be made; the only requirement is that a conflict of interests exists. But, in numerous other cases, such as *United States* v. *Marshall*, 488 F.2d 1169 (9th Cir. 1973) and

Sanchez v. *Nelson*, 446 F.2d 849 (9th Cir. 1971), it has been held that prejudice must be made a part of the test for determining ineffective assistance of counsel where the defendant retains counsel himself. If the test be only that the two defendants have a conflict of interests, then Petitioner can certainly be considered to have been deprived of his Sixth Amendment right, and, if this Court should decide that specific prejudice must be shown, then the claim in the instant case that Webster was deprived of effective counsel is even stronger. As mentioned previously, Petitioner's defense was neglected as the co-defendant's admission was considered against him by the jury without even an admonition limiting its effect. Further, the admission by Mrs. Spencer added substantially to the weight of the Commonwealth's case against Webster. The other evidence against him was entirely circumstantial. No witness saw Petitioner break into the Coca-Cola machine. Thus, with only circumstantial evidence from which to determine his guilt beyond a reasonable doubt, the jurors may have very well weighed Spencer's admission heavily as against Webster.

Finally, we believe that the Petition for Rehearing should be granted because in being denied the right of confrontation as a result of the ineffective assistance of counsel, Petitioner was denied a substantial constitutional right. Speaking of the right of confrontation as related to the problem to the introduction into evidence of a co-defendant's extra-judicial admission, this Court in *Russell* v. *Roberts*, 392 U.S. 293 (1968), spoke of the inherent danger to a defendant:

" . . . the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined."

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate the order, grant the Petition and review the judgment and opinion below.

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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

FRANK E. HADDAD, JR.